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THE DIVISION OF MATRIMONIAL ASSETS: A MATHEMATICAL METHODOLOGY AS A "CHECK"?

AJR v. AJS[1]

CHEN SIYUAN*****

In a recent High Court decision concerning the division of matrimonial assets, the Judge developed an extensive (and somewhat mathematical) methodology "as a rough check" to his discretionary powers in determining a "just and equitable" division of the matrimonial assets. This introduced a new perspective to an exercise long considered to be impossible to be mathematically precise. This piece considers the extent of the utility of the new methodology.

I. ESTABLISHING THE CONTEXT

Section 112(1) of the *Women's Charter*[2] is the principal statutory provision that governs the division of matrimonial assets in Singapore:

> The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.

Section 112(2) further provides a non-exhaustive list of factors that the court shall take into consideration, such as the extent of the contributions made by each party towards the matrimonial assets, the needs of the children of the marriage, and the extent of the contributions made by each party to the welfare of the family.

The division of matrimonial assets has long been considered by our courts as likely to be an imprecise mathematical exercise.[3] One of the reasons is that the court, as empowered by s. 112, is given a fairly broad discretion to make a division that is "just and equitable". The factors that the court may take into consideration are also non-exhaustive. Another reason is that contributions made by the spouses may not always be measurable in financial terms. Indeed, it has been suggested that s. 112 ought to be guided by three defining principles: (i) any asset acquired during marriage is liable to division; (ii) the power is to be exercised in broad strokes rather than a misguided attempt at mathematical precision; and (iii) the aim of the court is to reach a fair and reasonable division of the assets between the spouses.[4]

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* Assistant Professor of Law, Singapore Management University. I will like to thank my family and wife-to-be for their unceasing support and encouragement. I will also like to thank my wife-to-be for her comments on the draft, and also the comments of the anonymous referee. All errors, however, remain mine.

1 [2010] SGHC 199 [*AJR v. AJS*].

2 Cap. 353, 2009 Rev. Ed. Sing. [*Women's Charter*].

3 See *e.g., Koo Shirley v. Mok Kong Chua Kenneth* [1989] 1 Sing. L.R. (R.) 244 (H.C.) at paras. 16 and 25 [*Koo Shirley*]; *Yeong Swan Ann v. Lim Fei Yen* [1999] 1 Sing. L.R. (R.) 49 (C.A.) at para. 23; *NK v. NL* [2007] 3 Sing. L.R. (R.) 743 (C.A.) at paras. 28 and 36 [*NK v. NL*]; *AJR v. AJS*, *supra* note 1 at para. 19.

4 Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at 540-541 [*Elements of Family Law in Singapore*]. Professor Leong had gleaned these three principles from *Koo Shirley*, *supra* note 3. Although the case was decided under the predecessor to s. 112 of the *Women's Charter* (the then s. 106, a

However, in the recent High Court case of *AJR v. AJS*, the Judge, while mindful of the mathematical imprecision of the exercise, proposed an eight-step methodology "which takes into account the parties' *direct* attributable *and* unattributable financial contributions to the marriage as well as their *indirect* contributions to the marriage."[5] The Judge stressed that the proposed methodology was only for "comparison purposes and as a rough check whether I could have made a serious error in the exercise of my discretion" and that "the methodology is no more than a useful guide and is not a substitute for the [existing] judicial approach".[6] Nevertheless, the Judge in *AJR v. AJS* has given us a new (albeit supplementary) perspective to the issue and his judgment should be further examined.

Before we delve deeper into the proposed methodology, it seems appropriate to quickly recapitulate the existing judicial approach. This is imperative because first, the Judge in *AJR v. AJS* had referred to this several times, and second, the existing approach forms an indispensable basis for comparison (and analysis for compatibility) with the proposed methodology.

II. The Current Framework for the Division of Matrimonial Assets

The current leading (and perhaps most comprehensive) decision on the division of matrimonial assets is probably the 2007 Court of Appeal decision in *NK v. NL*,[7] which was also referred to in *AJR v. AJS*.

The facts are not particularly important for present purposes, so suffice to say that the appellant wife and respondent husband were married from 1982 to 2005, and there were four main contentions regarding the division of matrimonial assets: (i) the trial judge failed to factor in the profits from the sale proceeds of previous properties when dividing the interest in the matrimonial home; (ii) the trial judge failed to include the husband's company and related companies in the pool of matrimonial assets to be divided; (iii) the trial judge erred in the quantification of the cash assets available for distribution; and (iv) the trial judge had ordered a charge for the sum of $50,000 on the husband's CPF accounts.

The Court of Appeal first made some important prefatory remarks about s. 112 of the *Women's Charter*:

> To begin with, the [*Women's Charter*], enacted in 1961, was (as the terminology suggests) designed to protect the rights and interests of women in Singapore. Over the years, the [*Women's Charter*] has evolved to protect various social interests, such as the welfare of children and the institution of marriage, and to regulate the legal effects of a dissolution of marriage. Recent amendments further extend protection to the family, define the equal status and obligations of the husband and wife, and give the court greater powers to deal with incidents of family violence.
>
> The objective of the current provision for the division of matrimonial assets appears to be to strengthen its predecessor provision, to widen the court's powers and to give it the

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provision which was differently framed), Professor Leong further stated that the "power bestowed by section 112 of the *Women's Charter* is best exercised by keeping these three defining principles in mind".

5 *Supra* note 1 at para. 23 (emphasis in original).

6 *Ibid*.

7 *Supra* note 3.

> flexibility to effect a more just and equitable division after taking into consideration all the circumstances of the case…[8]

The Court of Appeal then laid down the basic principles of the application of s. 112, emphasising the equitable nature of a division of matrimonial assets:

> Section 112(2) of the [*Women's Charter*] enumerates a list of factors to be considered to assist the court in deciding whether to exercise its powers under s. 112(1), and, if so, in what manner. These considerations are not exhaustive and are subject to the overriding impetus of what is *just and equitable* in all the circumstances of the case. The division of matrimonial assets under the [*Women's Charter*] is founded on the prevailing ideology of marriage as an equal co-operative partnership of efforts. The contributions of both spouses are equally recognised whether he or she concentrates on the economics or homemaking role, as both roles must be performed equally well if the marriage is to flourish. When the marriage breaks up, these contributions are translated into economic assets in the distribution according to s. 112(2) of the [*Women's Charter*]. However, by this time… "the spouses' financial affairs [will] have become so inextricably tangled that an equitable knife must be used to sever the 'Gordian knot'"[9]. [10]

Next, the Court of Appeal laid down a methodology for division, beginning with the role of direct contributions, but being careful to point out that indirect non-financial contributions should be treated on a similar footing and that all the circumstances of the case had to be examined:

> The traditional approach is to consider direct contributions as a *prima facie* starting point before making adjustments to reflect the non-financial contribution of the parties... This prevalent approach of the courts held sway under the former s. 106 of the [*Women's Charter*][11] where the underlying spirit of s. 106(2) was to lean towards equality subject to the considerations mentioned therein…
>
> The traditional approach was considered in the Singapore High Court decision of *Soh Chan Soon v. Tan Choon Yock*[12] [which] interpreted direct financial contributions as only one factor amidst the multifarious factors for consideration…
>
> These observations were cited with approval in… *Yow Mee Lan v. Chen Kai Buan*[13] by Judith Prakash J, who emphasised… that a party's financial contributions to the acquisition of any particular matrimonial asset could not be primarily determinative of how it was divided, and that the court was free to give as much weight or more to other non-financial factors…

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8 *Ibid.* at paras. 15-16.

9 The Court of Appeal cited Lord Upjohn's judgment in *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175 (H.L.) at 1236.

10 *Supra* note 3 at para. 20 (emphasis in original).

11 Cap. 353, 1985 Rev. Ed. Sing. On the difference between the s. 106 of the then *Women's Charter* and s. 112 of the current *Women's Charter*, see *supra* note 4 and accompanying text.

12 [1998] SGHC 204 at paras. 6-7 and 9 (Warren L H Khoo J.).

13 [2000] 2 Sing. L.R. (R.) 659 (H.C.) at para. 32.

> Prakash J's approach was unequivocally endorsed by this court in *Lim Choon Lai v. Chew Kim Heng*[14] …
>
> These clarifications unequivocally reiterate the duty of the court to remain cognisant of the limitations of using the parties' direct financial contributions as a starting point. This is eminently sensible as direct financial contributions alone are far from determinative of the *actual* contributions to the economic partnership as a whole. Three points of guidance can be added. First, the abolition of the s. 106 distinction between joint and sole acquisition of assets paves the way for the court to put financial and non-financial contributions on an equal footing…
>
> Secondly, it is essential that courts resist the temptation to lapse into a minute scrutiny of the conduct and efforts of both spouses, which may be objectionable in disadvantaging the spouse whose efforts are difficult to evaluate in financial terms. Section 112 of the [*Women's Charter*] was enacted in response to the concept of marriage as an equal partnership of efforts, such that it would be counterproductive to try and particularise each party's respective contribution to wealth creation (although this does *not*, as we have recently emphasised in *Lock Yeng Fun v. Chua Hock Chye*[15] … signify equality as a starting point or norm in the division of matrimonial assets). In the absence of documentary evidence, courts must indeed make a "rough and ready approximation"[16] … and avoid falling back on the view that favours financial contribution to the acquisition of property.
>
> Finally, it is paramount that courts do not focus merely on a direct and indirect contributions dichotomy in arriving at a just and equitable division of matrimonial assets. The various factors enumerated by s. 112(2) of the [*Women's Charter*], which are no less important, must be duly assessed and considered as a whole. At the end of the day, no one factor should be determinative as the court's mandate is to come to a *just and equitable division* of the matrimonial assets having regard to *all the circumstances of the case*.[17]

The Court of Appeal then delved deeper into the role of indirect contributions, and upon a survey of the case law, identified two distinct methodologies, which the Judge in *AJR v. AJS* would later allude to:

> The first methodology consists of four distinct phases: *viz.*, identification, assessment, division and apportionment ("the global assessment methodology"). According to this approach, the court's duty is to (a) identify and pool all the matrimonial assets pursuant to s. 112(10) of the [*Women's Charter*]; (b) assess the net value of the pool of assets; (c) determine a just and equitable division in the light of all the circumstances of the case; and (d) decide on the most convenient way to achieve these proportions of division, [*i.e.*],

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14 [2001] 2 Sing. L.R. (R.) 260 (C.A.).
15 [2007] 3 Sing. L.R. (R.) 520 (C.A.) [*Lock Yeng Fun*].
16 See *Hoong Khai Soon v. Cheng Kwee Eng* [1993] 1 Sing. L.R. (R.) 823 at para.17.
17 *Supra* note 1 at paras. 23-29 (emphasis in original).

> how the order of division should be satisfied from the assets… Pursuant to this approach, the percentage for indirect contributions is applied without distinction to *all* matrimonial assets…
>
> The second methodology, on the other hand, involves an assimilation of all four of the above steps into a broad judicial discretion which, in the first instance, separately considers and divides classes of matrimonial assets ("the classification methodology"). Pursuant to this method, the court apportions classes of matrimonial assets separately, for example, the matrimonial home, cash in bank accounts, shares, and businesses, *etc*. Any direct financial contributions and indirect contributions are considered in relation to each class of assets, rather than by way of a global assessment…[18]

However, the Court of Appeal declined to endorse one methodology over the other. In its view, both were consistent with the legislative framework provided by s. 112, which placed primary importance of the facts and circumstances of the case. The court should therefore adopt the methodology which would lead to division in a *just and equitable* manner.

The Court of Appeal concluded its discourse with four subsidiary points:

(1) "Where one spouse… has devoted his or her entire time to the family over a lengthy period of time", one has to "ensure that indirect contributions are *not undervalued*";[19]

(2) "[P]ursuant to 'the classification methodology', only the direct contributions may vary. The element of indirect contributions in the context of homemaking and child caring must necessarily remain constant in relation to each class of asset… [T]his [classification] approach would be appropriate where there are multiple classes of assets, and where the parties have made different contributions";[20]

(3) "Where each spouse has discharged his or her homemaking role equally… this must be taken into account in achieving a just apportionment";[21] and

(4) "The exclusion of particular matrimonial assets from the overall computation in favour of dividing certain assets may possibly be rationalised as convenient and less obtrusive, but may create an impression of arbitrariness and ostensibly prejudice the fair and equitable division".[22]

III. A New Perspective?

A. *Facts of AJR v. AJS and Preliminary Issues*

Having set out the existing legislative and judicial approaches to the division of matrimonial assets, we turn to the new (but supplementary) perspective introduced in *AJR v. AJS*[23].

The parties were married in Guam in 1995. The marriage produced three children. Both parties had started life in the financial industry and were earning about the same amount initially

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[18] *Ibid.* at paras. 31-33 (emphasis in original).
[19] *Ibid.* at para. 34 (emphasis in original).
[20] *Ibid.* at para. 35.
[21] *Ibid.* at para. 37.
[22] *Ibid.* at para. 39.
[23] *Supra* note 1.

until the husband subsequently stayed home and became a househusband from 2001 to 2006. However, even after the husband stopped working, it was largely the wife who looked after their various investments and most of the household matters (including looking after the children). The wife filed for divorce in 2006 and interim judgment was granted in 2007.[24] One of the two issues (and the one that concerns us) before the Judge was the manner in which the matrimonial assets were to be distributed.

But there were three preliminary issues (*vis-à-vis* matrimonial assets) that the Judge decided to address first. Between the date of the interim judgment and the hearing before the Judge, there was "a change both in the value and in the nature of the assets through the acquisition of new assets".[25] Specifically, they were that: (i) the value of the assets had increased due to the accumulation of both parties' salaries earned after the interim judgment; (ii) the wife had purchased three properties in Malaysia for investment purposes; (iii) the wife had bought a piece of land in Singapore to build a house; (iv) the wife had exercised some stock options which she had acquired before the interim judgment; and (v) some of the proceeds from the sale of a property in South Africa (which had been acquired in the wife's name before the interim judgment) were only transferred to her account in 2008.[26]

The Judge, after consulting the local cases,[27] concluded that:

> [A]part from assets acquired before the marriage which satisfy the definition of "matrimonial assets" in s 112(10)(*a*) of the *Women's Charter*… the matrimonial assets available for distribution should be restricted to the assets acquired in the course of the marriage by both parties up to [the interim judgment]… The rationale behind this is that the interim judgment puts an end to the marriage contract and indicates that the parties no longer intend to participate in the joint accumulation of matrimonial assets nor in any further joint investment in any matrimonial assets with the associated market risk of a fall in the value of those joint investments, unless there is evidence to substantiate a mutual intention to the contrary.[28]

The second preliminary issue was whether an "innocent party to the marriage" should be "made to suffer" if the other party "indulged in certain vices involving a large amount of expenditure… to the extent that matrimonial assets [were] unfairly or unjustly depleted".[29]

The Judge opined that:

> [T]he court has a discretion to decide whether or not such a wasteful dissipation of matrimonial assets should be accounted for at all, and if so, the extent to which that wasteful dissipation should be accounted for in order to make the eventual distribution of matrimonial assets just and equitable for the innocent party.[30]

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[24] *Ibid.* at paras. 1 and 16.
[25] *Ibid*. at para. 3.
[26] *Ibid.*
[27] *Sivakolunthu Kumarasamy v. Shanmugam Nagaiah* [1987] Sing. L.R. (R.) 702 (C.A.) at para. 25; *Yap Hwee May Kathryn v. Geh Thien En Martin* [2007] 3 Sing. L.R. (R.) 663 (H.C.) at para. 26.
[28] *Supra* note 1 at para. 4. See also *ibid*. at para. 5.
[29] *Ibid.* at para. 6.
[30] *Ibid*.

The Judge sought to elaborate on this in his proposed methodology[31].

The third preliminary issue concerned the situation:

> [W]here one party, prior to the date of interim judgment, uses money from the pool of matrimonial assets to acquire assets in his or her own name in circumstances in which both parties are aware that the party acquiring such assets is making the investment for his or her own purposes and has no intention that the other party partake in such investment, and where the other party could not reasonably have expected to share in the investment in the event of a divorce.[32]

The Judge opined that "the court also has a discretion to decide how to account for such expenditure", [33] and also sought to elaborate on this in his proposed methodology.[34]

B. *The Result Based on the Broad Discretion*

The Judge then listed the assets which existed on the date of the interim judgment, as follows: (i) an Australian property; (ii) Perth Mint (gold); (iii) Perth Mint (silver); (iv) proceeds from the sale of the South African property; (v) the wife's stock options; (vi) monies in the wife's bank accounts; (vii) monies in the wife's CPF accounts; (viii) monies in the husband's bank accounts; and (ix) monies in the husband's CPF accounts.[35]

The Judge, on the basis of his broad powers vested in him by s. 112, and in consideration of the principles established in *NK v. NL* (which have been set out in the previous section of this piece), first held that "the proportion of the total net value of matrimonial assets available for distribution which it would be just and equitable to award to the husband, is in my view broadly 20%".[36] The wife was to receive the remaining 80%.

This result was predicated on the fact that: (i) "equality of division of matrimonial assets was not the norm and that in the large majority of cases decided by the courts, equality of division was not achievable on the facts";[37] (ii) this was "not a case where one marriage partner took care of all the responsibilities of looking after the children and household while the other focused on her career";[38] (iii) under the "classification methodology", it was difficult to account for unattributable "direct financial contributions to the family welfare (such as food, school expenses, medical expenses, utilities, and holiday expenses)"; [39] (iv) "in most marriage partnerships it is largely fortuitous as to which party contributes directly towards the acquisition of matrimonial assets";[40] and (v) the ratio of the total incomes (of both parties) during the life of

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31 See Part C, below.
32 *Supra* note 1 at para. 7.
33 *Ibid*.
34 See Part C, below.
35 *Ibid.* at para. 8.
36 *Ibid.* at para. 16. See also *ibid.* at paras. 18-20 and 23.
37 *Ibid.* at para. 15. The Judge cited *Lau Loon Seng v. Sia Peck Eng* [1999] 2 Sing. L.R. (R.) 688 (H.C.) and *Lock Yeng Fun*, *supra* note 15.
38 *Ibid.* at para. 16.
39 *Ibid.* at para. 21.
40 *Ibid.* at para. 22.

the marriage would *prima facie* determine the parties' respective direct financial contributions (both attributable and unattributable) for the purpose of division.[41]

C. *The Proposed Methodology: A Check on Discretion?*

We proceed then to the precise steps in the Judge's proposed methodology that was supposed to act as a check to his discretion (and as a "useful guide").[42] Essentially, he considered that parties to a marriage "may make *direct* financial contributions to the marriage in different ways, some of which are totally unrelated to the acquisition or maintenance of any identifiable matrimonial assets, *e.g.*, food, education etc… whilst others are traceable to matrimonial assets", and the methodology "takes into account the parties' *direct* attributable *and* unattributable financial contributions to the marriage, as well as their *indirect* contributions to the marriage."[43] The methodology comprised eight steps, which can be summarised as follows:

1. *Total net value of matrimonial assets to be distributed*

The notional total net value of matrimonial assets to be distributed is denoted as $*A*. This consists of the total net value of the matrimonial assets to be distributed ($*m*), plus: (i) the value of any matrimonial asset proved to have been unfairly dissipated ($*n*); (ii) and the value of any matrimonial asset expended by either party for a personal investment in which the other party cannot reasonably have expected to participate in ($*p*). The assets considered will be those that existed on the date of interim judgment, less any outstanding liabilities which were incurred before the interim judgment. If any asset was sold or liquidated after the interim judgment, the net proceeds will be used to represent the value of that asset in the calculation of $*m*.[44] Thus, $*A* may be represented in the following equation:

$$\$A = \$m + \$n + \$p$$

2. *The percentage of direct contributions of both parties and indirect contributions of both parties*

The total contributions of both parties to the marriage will be apportioned into the percentage total direct contributions of both parties (*B*%) and the percentage total indirect contributions of both parties (*C*%). *B*% and *C*% add up to 100%. The ratio of *B*% to *C*% depends on factors such as: (i) length of marriage; (ii) number of children; (iii) existence of a third party carer; (iv) extent of assisting the other party (such as in the occupation or business); and (v) total amount of time and effort that both parties had spent looking after the welfare of the family may affect the relative weightage or importance of the total direct contribution as against the

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41 *Ibid*.

42 *Ibid.* at para. 23.

43 Supreme Court, "Supreme Court Note: AJR v AJS [2010] SGHC 199 (division of matrimonial assets)" *Supreme Court Note* (July 2010), online: Singapore Law Watch <http://www.singaporelawwatch.sg/remweb/legal/ln2/rss/commentaries/68335.html?utm_source=rss%20subscription&utm_medium=rss> (emphasis in original). See also *ibid*. at paras. 21 and 23.

44 *AJR v. AJS*, *supra* note 1 at paras. 26-27.

total indirect contribution of both parties.[45] The relationship between *B*% and *C*% may be represented in the equation:

$$B\% + C\% = 100\%$$

3. *The direct contributions of each party*

The husband's total direct contribution to the marriage is denoted as *D*% and the wife's total direct contribution to the marriage is denoted by *E*%. *D*% and *E*% add up to 100%. In determining direct contribution, unless disputed, it will be assumed that the parties have applied all matrimonial assets (as defined in s. 112(10)) that they have received in the course of the marriage to the welfare of the family. This includes earned salary, monetary emoluments, income from business (including stock options), and the amount accumulated in the CPF accounts. *D*% and *E*% will be multiplied by B% separately to obtain *DB*% and *EB*%.[46] The relationship between *D*%, *E*% and *B* is as follows:

$$D\% + E\% = 100\% \text{ of } B$$

4. *The indirect contributions of each party*

The husband's share of the total indirect contribution to the marriage (*F*%) and the wife's share of the total indirect contribution to the marriage (*G*%) will be determined on the facts of the case. *F*% and *G*% together should be 100%, representing the total indirect contribution of both parties towards the marriage partnership. *F*% and *G*% will be multiplied by *C*% respectively to obtain *FC*% and *GC*% as the percentage of matrimonial assets which is to be awarded to the husband and wife respectively, arising from his/her indirect contribution to the family.[47] The relationship between *F*%, *G*% and *C* is as follows:

$$F\% + G\% = 100\% \text{ of } C$$

5. *The value of matrimonial assets to be distributed to the husband*

The notional total value of matrimonial assets to be distributed to the husband (*X*) is arrived at by adding *DB*% and *FC*%, which is then multiplied by the notional total value of all the matrimonial assets available for distribution ($*A*):[48]

$$X = \$A \times (DB\% + FC\%)$$

6. *The value of matrimonial assets to be distributed to the wife*

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[45] *Ibid.* at paras. 28-30.
[46] *Ibid.* at paras. 31-33.
[47] *Ibid.* at para. 34.
[48] *Ibid.* at para. 35.

The notional total value of matrimonial assets to be distributed to the wife (*Y*) is arrived at by adding *EB*% and *GC*%, which is then multiplied by the notional total value of all the matrimonial assets available for distribution ($*A*):[49]

$$Y = \$A \times (EB\% + GC\%)$$

7. *The deduction of the value of assets dissipated or expended exclusively for one party's purposes from the amount of matrimonial assets to be distributed to that party responsible for that dissipation or exclusive expenditure*

The total value of assets that have been unjustly dissipated from the pool of matrimonial assets, or expended for the acquisition of personal investments in circumstances in which neither parties intended the other party to participate in such investments will be deducted from the notional total value of matrimonial assets to be distributed to that party. Assuming the husband has removed $*H* in assets from the pool, the actual value of matrimonial assets which will be distributed to him will be [$*A* x (*DB*% + *FC*%) - $*H*]. If the wife has removed $*J* in assets from the pool, the actual value of matrimonial assets which will be distributed to her will be [$*A* x (*EB*% + *GC*%) - $*J*].[50]

8. *The final value of matrimonial assets to be distributed to each party*

The final ratio of the value of the matrimonial assets to be received by the husband and the value of matrimonial assets to be received by the wife can thus be reflected as [$*A* x (*DB*% + *FC*%) - $*H*]: [$*A* x (*EB*% + *GC*%) - $*J*]. This ratio may be applied to the total pool of matrimonial assets actually valued at the total net amount of $*m* or to the net value of each and every matrimonial asset if the matrimonial assets are to be distributed individually.[51]

IV. Analysis of the Paradigm and Conclusion

The Judge seems to have meticulously developed an orderly and mathematical (and almost formulaic) framework that – it bears repeating – is designed only to *assist* in the exercise of the division of matrimonial assets. This new framework appears original and looks impressive without being too convoluted, yet therein lies the potential tension between this new paradigm of seeming precision, and the existing statutory and judicial framework that is unequivocally averse to mathematical precision. It does seem a matter of degree, however. Obviously a judge cannot be apportioning matrimonial assets on a whim, hazarding arbitrary guesses for undisclosed assets, or conjuring up numbers, ratios, and equations out of nowhere. On the other extreme, a judge cannot (and should not, based on the cases) be parsing through every single detail and aiming for scientific or mathematical absolution. In other words, it is not a binary question of "shall we be totally precise" or "shall we be totally imprecise". The current and prevailing sentiment appears more to be "it is almost impossible to be precise in such an exercise (of the division of matrimonial assets), but let us try to be as fair as possible". If we equate fairness with *greater* – and not perfect – precision, then this new methodology passes muster on that count

[49] *Ibid.* at para. 36.
[50] *Ibid.* at para. 37.
[51] *Ibid.* at para. 38.

(and should not be feared given its simplicity and actual reach). That is, the paradigm is merely being faithful to "it is almost impossible to be precise in such an exercise, but let us try to be as fair and precise as possible." It may be said that this is consistent with the courts' recognition of an *increasing array* of factors to the (albeit discretionary) calculations over the years,[52] yet it may also be said that the more one tries to pre-empt a framework and pre-set the boundaries, the more unnecessary impediments are presented to the court's exercise of what is essentially (and legislatively intended to be) a broad and dynamic discretion.

A possible response to the latter point in the preceding statement is that the new methodology did not (and did not purport to) inject anything overly ambitious or unworkable *vis-à-vis* the existing framework.[53] It is submitted that the complexities lie not in the application of the new methodology, but continue to lie in the derivation of the numbers that fill the parameters of the new methodology, to which perhaps no concrete solution can be offered.[54] At any rate, a restatement of the eight-step methodology in simpler and non-abstract terms may be helpful:

(1) Let us suppose that the assets in question are a house worth $450,000, and two joint accounts containing $100,000. $*m* is thus $550,000. Let us further suppose that the husband had unfairly dissipated $50,000. $*A* is thus $600,000.
(2) Let us suppose that the direct contributions (*B*) make up 60% and the indirect contributions (*C*) make up 40%.
(3) Let us suppose that the husband's share of the total direct contributions (*D*) is 40% and the wife's share of the total direct contributions (*E*) is 60%. Accordingly, *DB*% is 24% and EB is 36%.
(4) Let us suppose that the husband's share of the total indirect contributions (*F*) is 70% and the wife's share of the total indirect contributions (*G*) is 30%. Accordingly, *FC*% is 28% and *GC*% is 12%.
(5) The husband's share of $*A* is thus 52%.
(6) The wife's share of $*A* is thus 48%.
(7) Given the $50,000 unfairly dissipated by the husband, the actual value of his assets is $262,000. The actual value of the wife's assets is $288,000.
(8) The final husband-wife percentage-ratio is thus 47.6:52.4.

So on this view, it appears that this new methodology is in the right spirit and, once distilled, of the right complexity (and arguably of compatibility with the existing methodology), although without adding much in terms of how one arrives at the crucial fields of "*B*%", "*C*%", "*F*%" and "*G*%". In particular, attributing percentages to the total direct contributions (*B*%) and total indirect contributions (*C*%) requires valuing monetary earnings against non-monetary efforts – an exercise impossible to execute with any mathematical precision.

In *AJR v. AJS*, the Judge chose 65% and 35% respectively to signify the total direct contributions and total indirect contributions of both parties, taking into account that the engagement of the services of two domestic helpers by the parties resulted in the reduction of the total indirect contributions "in terms of sparing the parties the time and effort expended in

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[52] For instance, the role of indirect contributions, unattributable contributions, expenditures after the first decree, and so forth.

[53] But then see the "sensitivity analysis" that emerged after the application of the proposed methodology: *AJR v. AJS*, *supra* note 1 at paras. 57-58.

[54] *Ibid.* at paras. 41-55.

cooking, washing and cleaning the home which would otherwise comprise part of the indirect contribution to be taken into account of the party attending to such household chores for the welfare of the family".[55] From this, it could be inferred that had the parties been solely responsible for the management of their household, *B*:*C* ought to be nearer to or perhaps at a ratio of 1:1. This ought to be correct in light of the fact that monetary and non-monetary contributions are supposed to be placed on an "equal footing".[56] Nevertheless, it is rather obvious that despite its formulaic appearance, a substantial amount of non-mathematical discretion is involved in the exercise, and this means that it may be more fruitful to just abandon any sort of mathematical rigidity altogether and focus on whether there is anything to suggest that the partnership has not been an equal one.[57]

Additionally, there is still the issue of what happens when the figures (or to be precise, final ratios) arrived at using this methodology, for whatever reason, differs significantly from a "rougher" calculation based on the existing statutory and judicial framework? The Judge had said that this methodology is not intended to supersede existing methodologies, and is only meant as a "check" on discretion or as a "useful guide", so what happens when the figures (ratios) do not square very well? The characterisation of the methodology as either a check or having an guiding function is thus problematic in such a situation – is there much utility for a supplementary methodology that can only be invoked to confirm and *not* to rebut? On this point, it is also difficult not to raise questions when the judge's proposed methodology produced exactly the same result as that derived from a rough and broad application of his discretionary powers. Was the application of this methodology in this case thus an instance of *ex post facto* reasoning?

In any event, if indeed we accept the premise that the new methodology is not really different from the existing methodology, then there is technically nothing stopping us from embracing it as something more than its current tentative (and therefore unhelpful) characterisation, although it has to be seriously questioned as to why there has been hitherto no mathematical framework ever advocated (in fact, quite the contrary). On the other hand, any formulaic framework will always be approached with some apprehension, simply because of the possible trammelling of the judge's discretion. Perhaps the next Court of Appeal decision that deals with the division of matrimonial assets can provide some comments on the role of this new methodology.[58] Even so, that is merely the general point, concerning the technical soundness of this supplementary paradigm. This case also raises some specific and wider social concerns which need to be addressed.

The relationship in this case was never refuted as an equal co-operative partnership, albeit of different efforts. This was a 12-year union between a very financially successful wife and a less financially successful husband, who had the misfortune of suffering a medical condition since 2001 when he stopped working. In fact, his Attention Deficit Disorder was only diagnosed towards the end of the marriage in 2006, but this must have made it hard for him to consider continuing to work. This was also a relationship without any serious allegation of misconduct (on the part of either party) or anything extremely out of the ordinary regarding their relationship as spouses. Is it then the fairest division of the spoils when the court declares that the wife should

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55 *Ibid.* at para. 42.

56 *NK v. NL*, *supra* note 3 at para. 27.

57 But it should be noted that the Court of Appeal had categorically rejected equality as a presumed starting point in the division of assets: see *e.g.*, *Lock Yeng Fun*, *supra* note 15 at para. 55.

58 At this point in writing, it is believed that an appeal has been lodged for *AJR v. AJS*, *supra* note 1.

receive four times more than the husband? One has to trawl back in time to find cases with such a disparity – and those cases usually involved some extreme facts or behaviours not necessarily related to financial capabilities.[59] So what does this proportion of division in this case convey, implicitly or explicitly, to all the married people (or people about to marry, for the matter) in Singapore of the nature of their commitment in marriage? After a series of cases in which the courts have clearly recognised the importance of non-financial contributions (and the impossibility of quantifying and weighing them precisely with any real meaning),[60] is the paradigm proposed here (in effect) bucking the trend for any good reason? In the same vein, what is its effect on how lawyers will argue cases (where one party clearly has much more financial contributions), and what is its effect where it is the wife who is the homemaker or who contributed less in money towards the acquisition of wealth?[61] In the whole scheme of things, while this case will probably be treated as an aberration (both in content and conclusion), sometimes all it takes is one unresolved precedent to unravel everything or send the wrong message (even if the intentions are good).

On yet another view, can it not be said that a mathematical methodology is, in most instances, very likely to prejudice the spouse who earned less income during the marriage, or conversely, favour the breadwinner?[62] After all, the rationale behind statutorily bestowing a broad discretion on the courts to achieve the fairest possible division is to avoid both of these types of biases. Only by avoiding these biases are the divorcing spouses held to their commitment to pool their different efforts during marriage for their mutual benefit; why then, upon divorce, should the message be any different? In the case at hand, considering that the husband was clearly less successful than the wife in bringing in income (2 million versus 20 million) during the course of the marriage, it will seem that any sort of mathematical model will only serve to give him, as a matter of preliminary impressions, a proportion far smaller than the wife's. Though the final result appears ameliorated by the factoring in of various non-monetary contributions, but as submitted above, these are crucial fields in the equation that are not easily determined, and in the circumstances, there may even be the separate problem of a perception or suspicion of a judicial "inflation" of the non-monetary contributions of the husband to compensate for the lop-sided result (had monetary contributions prevailed).[63]

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[59] See the extensive surveys of the jurisprudence done by Professor Leong in *Elements of Family Law in Singapore*, *supra* note 4 at 533-536, 551-555, and 700-751.

[60] *Ibid.* at 533, 542, 546, and 666-675.

[61] Fortunately, not only are there cases that clearly frown upon an over-emphasis on financial contributions, there are cases that even suggest that the length of the marriage is not necessarily an important factor either: *ibid.* at 675 and 688-691.

[62] See *ibid.* at 675:

> [T]here should no longer be emphasis on financial contribution over non-financial contribution. The exercise of the power is moved by the family law view of how wealth is co-operatively accumulated by both spouses exerting different efforts during marriage and, concomitantly, rejects the property law view that only financial contribution counts towards acquisition where the issue arises between spouses upon the termination of marriage. This relates with the underlying premise that on marriage the spouses have engaged in an equal co-operative partnership of different efforts so that who between them discharged which effort should neither favour nor prejudice the spouse in entitlement to the surplus wealth that remains at the termination of their partnership.

[63] Indeed, it is unconvincing how the Judge could have reasonably considered all of the non-monetary contributions over a 12-year marriage in just one paragraph: see *AJR v. AJS*, *supra* note 1 at para. 42.

With the foregoing concerns in mind, it is submitted that although the Judge must have perceived greater mathematical precision to be synonymous with fairness, the proposed paradigm is not without its problems, both from a technical and social viewpoint.